UNITED STATES v. ED BRANDT

IBLA 75-223 Decided July 22, 1975

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing contests I-5081 and I-5085 against building stone mining claims.

Set aside and remanded.

1. Mining Claims: Common Varieties of Minerals: Special Value -- Mining Claims: Common Varieties of Minerals: Unique Property

   Building stone which is not suitable for any uses other than those to which ordinary building stone is put, and which does not command a higher market price than other similar building stone, may be considered locatable after July 23, 1955, as an uncommon variety of stone, only if it has a unique property which imparts a special value to the stone reflected in higher price or a substantially greater profit to the locator due to reduced overhead and costs of extraction and processing.

2. Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Appeals: Burden of Proof -- Rules of Practice: Appeals: Hearings

   In a mining claim contest, the claimant is the proponent of the rule or order that he has complied with the provisions of the mining law, which have been brought into issue, and the Government bears the burden only of presenting a prima facie case of invalidity; the claimant must then preponderate on the issues litigated.

3. Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Appeals: Hearings

Where the hearing record in a mining claim contest is unsatisfactory, a "stipulation" on another issue may have prevented the introduction of evidence relevant to the issue on appeal, the parties will not be unduly burdened, and further proceedings will likely be productive of relevant evidence, the Board may remand the case for additional hearing.

APPEARANCES: Ed Brandt, pro se; Riley C. Nichols, Esq., Office of the Field Solicitor, Department of the Interior, Boise, Idaho, for contestant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The Regional Solicitor, on behalf of the Idaho State Office, Bureau of Land Management (BLM), has appealed from the October 25, 1974, decision of Administrative Law Judge Robert W. Mesch dismissing without prejudice the BLM's contest complaints filed against contestee Ed Brandt's placer building stone mining claims located under the Building Stone Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970). Contest I-5081 against the Brownstone placer mining claim, in section 6, T. 6 S., R. 1 W., Boise Mer., Owyhee County, Idaho, and Contest I-5085 against the Silver Sands, Silver Sands No. 2 and Leap Year placer mining claims, in section 11, T. 1 N., R. 4 W., B.M., Owyhee County, Idaho, charged that the respective claims were null and void because: (1) the material on the claims is not a valuable mineral deposit under section 3 of the Surface Resources Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1970); and (2) valuable minerals have not been found within the limits of the claims so as to constitute valid discoveries within the meaning of the mining laws. After contestee timely denied the claims' invalidity, the cases were consolidated and set for hearing.

At the hearing, the Field Solicitor stipulated that the marketability of the material from the claims was not being challenged (Tr. 107), and the evidence submitted by the Government, including wholesale building stone price lists developed by the BLM's mining engineer (Exs. 5, 6), supported the stipulation. Rather, the dispute was limited to, and the exhibits were developed on, the issue of whether the types of stone were uncommon varieties of stone within the meaning of section 3 of the Surface Resources Act.

[1] That Act withdrew from the operation of the mining laws, including the Building Stone Act, any "deposit of common varieties of * * * stone." See United States v. Coleman, 390 U.S. 599, 604-05 (1968). Thus, in order for contestee's mining claims, located after 1955, to be valid, the deposits must have "some property giving [them] distinct and special value." 30 U.S.C. § 611 (1970). According to the test defined by the Department and approved by the courts, the deposit must have a unique property and that property must give the deposit a distinct and special value, either for some use to which ordinary varieties could not be put, or in commanding a higher market value for the same use to which common varieties are put. E.g., United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973); United States v. California Soylaid Products, Inc., 5 IBLA 179 (1972); Atchison, Topeka & Santa Fe Ry. Co. v. Cox, 4 IBLA 279 (1972); United States v. U.S. Minerals Development Corp., 75 I.D. 127, 134 (1968).

At the hearing, no evidence indicated that the rhyolite from the Brownstone claim and the sandstone from the Silver Sands, Silver Sands No. 2 and Leap Year claims had any other use than as building stone, in decorative masonry and veneer stonework. In addition, contestee admitted, as contestant demonstrated, that the material from the claims at issue did not command a higher price in the market than other similar stone used for the same purposes (Tr. 108, Exs. 5, 6). Thus, the only ground remaining for finding the material on the claims to be an uncommon variety was the possibility that the material meets the test of McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969), applied in United States v. McClarty, 17 IBLA 20, 42, 81 I.D. 472, 481-82 (1974), that the unique property of the deposits, while not reflected in a higher market price, still gives the claimant a substantially greater profit due to lower overhead costs of removal and processing.

Contestee initially maintained that the material on the claims was not "common variety" in that he could produce and sell it at a profit (Tr. 76, 108-09). Upon realizing that the dictionary definition of "common" meaning "mediocre" was not involved, he explained why he felt the material was locatable and worth locating. He testified that the rhyolite on the Brownstone claim was unique because, unlike almost all other deposits of rhyolite in the area (Tr. 129), it lies fractured into four-inch thick slabs on the surface of the claim (Tr. 73, 117-18). The slabs are uniformly four inches thick, the shape stonemasons demand, as they lie on the ground, and contestee's personnel have only to select such pieces without any need to carve or break them (Tr. 118, 129).

He testified that the sandstone found on the Silver Sand, Silver Sand No. 2 and Leap Year claims is unique because

> * * * the particles that go to make it up are very small and very closely spaced, and it's been

> highly solidified, still retaining evidence of a bedding plane, but not retaining the friability of a bedding plane, and that it will break equally well, parallel to, across or diagonally from the bedding plane (Tr. 110).

He testified that most other stones break only along the bedding plane, and then only under a rock-cutting guillotine (Tr. 111). He can break a properly selected block of his sandstone "across the bedding plane with no more than three hits with the sledge hammer," into pieces as straight as if they were sawed (Tr. 112). The breaking properties of the sandstone, clean-edged breaks without the need for a rock guillotine, make it desirable to stonemasons, according to contestee's testimony (Tr. 116-17). On cross-examination he testified that the workability of this stone led masons to bid cheaper on jobs using the stone, to the benefit of the construction contractor (Tr. 121).

In its post-hearing brief contestant argued that the materials at issue were not unique, as all building stone must break or fracture into pieces of suitable dimension to be usable, and even if they were to be ruled "unique" because of these properties, that uniqueness did not translate itself into a higher market price for the materials (Post-hearing brief at 14-15).

In his decision, the Administrative Law Judge noted that contestee did not introduce any records or figures to demonstrate that he might have a substantially higher profit due to low production costs. 1/ After ruling that the rhyolite and sandstone were not valuable for any other purpose than ordinary varieties of building stone, and that the material did not command a higher market price due to any asserted unique property, he discussed the dearth of evidence on the issue of whether contestee's stone might be an uncommon variety on account of lower costs of removal and preparation for sale and use than other competing building stone deposits.

The mineral examiners' testimony was not directed to this point at all, and their opinions that the material was common were based entirely on market price and the use of the stone (Tr. 20-21, 42-43, 71, 85). Mining engineer Barnes testified to the relatively uniform size of the blocks on the Brownstone claim,

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1/ In fact, contestee's attempt to introduce his business and sales records evoked objection on the ground that marketability was not at issue. The Administrative Law Judge sustained this objection, upon contestee's admission that he did not assert he got a higher market price for material from his claims (Tr. 107-08).

and the fact that they did not have to be mined (Tr. 71-73), corroborating contestee's testimony on the nature of the rhyolite deposit.

The Administrative Law Judge held:

> I am not willing to conclude that the evidence supports the allegations in the complaints and that the sandstone and rhyolite have no unique properties which is reflected by reduced costs or overhead so that the profit to Mr. Brandt is substantially more even though the market price is competitive with other building stone. This does not mean, however, that Mr. Brandt is entitled to a finding that the mining claims are valid insofar as this particular issue is concerned. I am not willing to infer (1) that there are no other deposits of "rubble" building stone in the market area that do not possess the unique properties described by Mr. Brandt and (2) that, in the absence of comparative production figures or other evidence, Mr. Brandt's costs or overhead are such that his profit is substantially more than the profit to producers of other building stone used for the same purposes.
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> Accordingly, the complaints are dismissed without prejudice.

[2] On appeal, contestant argues that the Administrative Law Judge erred because his holding placed the burden of proof (risk of nonpersuasion) on the issues raised by the complaint on the contestant, contrary to established Departmental precedent, citing Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), and a host of other cases.

In Foster v. Seaton, supra, the Circuit Court held that in a mining claim contest the mining claimant has the burden of proof as the proponent of the rule or order, namely, that he has complied with the contested aspects of the mining law. 5 U.S.C. § 556(d) (1970). The Court approved the Secretary's formulation that:

> [the Government] bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

Foster v. Seaton, supra at 838 (footnote omitted).

[3] In United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975), this Board discussed burden of proof and weight of evidence in mining claim contests in which definitive evidence is not introduced. The Board noted that an Administrative Law Judge may, while a case is still before him, reopen the hearing for the production of further evidence, as long as no unreasonable burden is placed on the parties and there is a reasonable likelihood significant evidence will be developed at such a rehearing. Id. at 21-22, 82 I.D. at 72-73. 2/ In addition, the Board itself has ordered further hearing when the record on a central issue is unsatisfactory. E.g., United States v. Heard, 18 IBLA 43 (1974); United States v. Kincanon, 13 IBLA 165 (1973); United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973); United States v. Wells, 11 IBLA 253 (1973); United States v. Ideal Cement Co., 5 IBLA 235, 79 I.D. 117 (1972), aff'd Ideal Basic Ind., Inc. v. Morton, Civ. No. J-12-72 (D. Alas., Feb. 25, 1974), appeal pending, Civ. No. 74-2298 (9th Cir., filed June 3, 1974); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972).

While contestant established a prima facie case that the materials at issue were common varieties of building stone, it did this without presenting evidence on the direct point at issue here, namely, whether or not the nature of the rhyolite deposit on the Brownstone claim, and the breakage characteristics of the sandstone on the other claims, give them special value in contestee's reduced overhead and costs of extraction. Contestant's only evidence supported contestee's claim of uniqueness on this basis for the rhyolite blocks on the Brownstone claim (Tr. 71-73).

On the Silver Sands group of claims, mining engineer Brunelle's testimony on this point indicated that the sandstone had "fair cleavage" (Tr. 83), but he did not split any of the rock (Tr. 84), and he did not testify on the economics of its extraction and preparation for market. Contestee's testimony that a rock guillotine was unnecessary in shaping the sandstone he sold indicated a potential competitive advantage. However, he introduced no documentation of cost figures or cost savings attributable to this assertedly unique characteristic of the stone. The record stands with a rebuttal, but an inconclusive rebuttal, of a prima facie case that did not address this aspect of the common/uncommon variety issue.

We find this case appropriate for further hearing. In United States v. U.S. Minerals Development Corp., 75 I.D. 127, 135-36 (1968), the Acting Solicitor set aside and remanded for hearing a case in which the record contained only limited evidence on the issue of any special and distinct value of the

2/ The Board's decision in United States v. Taylor, supra, issued after the Administrative Law Judge's decision in this case.

building stone involved for the same reason the record is deficient in this case -- the marketability of the deposits was stipulated. We find U.S. Minerals Development Corp. persuasive in rationale. The case at issue also meets the test set out in United States v. Taylor, supra, that the additional hearing not create an undue burden for the parties and that it be likely to produce significant relevant evidence. Contestee was prepared to introduce evidence that might have gone to the issue in this case, but the stipulation on marketability apparently precluded its introduction. The record does indicate that material relevant to this issue may be available.

Therefore, we remand the case for further proceedings directed to the issue of whether or not the material on the Brownstone, Silver Sands, Silver Sands No. 2, and Leap Year claims 3/ is an uncommon variety of stone within the meaning of section 3 of the Act of July 23, 1955, because contestee makes a substantially greater profit on account of the lower overhead and costs due to ease of removal, quarrying and stone-cutting of the rock from the claims at issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is set aside and the case remanded for further hearing in accordance with this opinion.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

3/ While evidence of the extra value of the sandstone from the Silver Sands group of claims to stonemasons who work with it, like that already introduced by contestee (Tr. 121), may be admissible to show value and costs, we emphasize that the evidence should distinguish value to contestee due to lower overhead and quarrying costs from value to the stonemasons due to ease of workability. See discussion in United States v. McClarty, supra at 45-46, 56-58, 81 I.D. at 483, 488-89 (1974).